UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH EDWARDS, Plaintiff, - against - CITY OF NEW YORK; C.O. WILLIAMS-SMITH; C.O. JOHN DOE 1; C.O. JOHN DOE 2; C.O. JOHN DOE 3; C.O. JOHN DOE 4, Defendants.	14-cv-10058 (KBF)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Although Defendants have moved to dismiss the claims of Plaintiff Ralph Edwards ("Plaintiff" or "Mr. Edwards") arising from his vicious beating by officers of the New York City Department of Correction on two separate grounds, neither of Defendants' arguments withstands any real scrutiny.

Defendants' first argument, that the news articles, governmental statements reports, and prior lawsuits cited by Plaintiff do not suffice to plead claims against the City under *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 694 (1978), is counter to the weight of the case law in this Circuit. The sources cited in the Amended Complaint describe in detail the persistent and widespread use of excessive force by corrections officers against detainees and inmates, including in situations similar to what happened to Mr. Edwards. While such citations might not, without supplementation by admissible evidence obtained in discovery, be sufficient to overcome a motion for summary judgment under Fed. R. Civ. P. 56, numerous courts have held that such allegations, combined with the specific facts and circumstances of Mr. Edwards's beating, are more than sufficient to withstand a motion to dismiss pursuant to Rule 12(b)(6).

Defendant's second argument, that Plaintiff's claims against Defendant Smith-Williams are untimely because Plaintiff's original complaint mistakenly inverted the order of her hyphenated surname to "CO Williams-Smith" and the Amended Complaint, which corrected that mistake, was filed after the statute of limitations had expired, fares no better. The Amended Complaint properly relates back to the original complaint because Defendant Smith-Williams had actual and constructive notice of Plaintiff's claims within the time period permitted for service of the original complaint, and the inversion of her hyphenated surname was obviously an excusable mistake under Fed. R. Civ. P. 15(c).

RELEVANT BACKGROUND

Mr. Edwards filed this action *pro se* on December 17, 2014, to seek redress for the vicious beating he suffered in December 2011 at the hands of multiple officers of the New York City Department of Correction ("DOC") while he was awaiting arraignment at the Bronx Criminal Court. (*See* Compl., ECF No. 2.) He named as defendants the City of New York, four John Doe corrections officers, and "CO Williams-Smith." (*See id.*) The Complaint identified "CO Williams-Smith" as "a corrections officer employed at . . . the Bronx Criminal Court" who was present when Mr. Edwards was beaten on or about December 18, 2011. (*See id.* ¶¶ 5, 10, 14-15.)

Pursuant to *Valentin* v. *Dinkins*, 121 F.3d 72, 75-76 (2d Cir. 1997), on January 12, 2015, this Court ordered counsel for the City of New York to "ascertain the full name and shield number for defendant Williams-Smith" and "the identities of John Does 1-4" within 60 days. (*See* Order 2, Jan. 12, 2015, ECF No. 6.) The Court also "request[ed] that defendants Williams-Smith and the City of New York waive service of summons." (*Id.* at 3.) The DOC subsequently refused to waive service for "CO Williams-Smith," claiming that it could not identify her. (*See* Waiver of Service of Summons Unexecuted, Feb. 9, 2015, ECF. No. 7.)

However, on March 13, 2015, the City's counsel identified "CO Williams-Smith" as Correction Officer Smith-Williams, Shield No. 10437, noting that her "names were inverted in the caption" of Mr. Edwards's original complaint. (Letter Mot. for Extension of Time to Identify the John Doe Defs. 2, Mar. 13, 2015, ECF No. 9.)[1] The City's counsel also represented to the Court that it intended to "interview[] Correction Officer Smith-Williams now that she has been

[1] To date, the City has not identified any of the John Doe defendants.

identified." (*Id.* at 2.) By letter dated May 11, 2015, counsel for the City confirmed that he had interviewed Correction Officer Smith-Williams. (Letter re: Status Report 2, ECF No. 20.) Even after the inversion of Correction Officer Smith-Williams's name was identified, she did not waive service of the summons.

Shortly thereafter, Mr. Edwards requested that the Court assign pro bono counsel to assist him in prosecuting this action. (*See* Letter from Ralph Edwards dated 4/24/15, ECF No. 19.) Paul, Weiss Rifkind, Wharton & Garrison LLP entered notices of appearance as counsel for Mr. Edwards on May 29, 2015. (*See* Notices of Appearance by Roberta A. Kaplan, Elizabeth Gallagher McCabe, Marissa C.M. Doran, and Ross Edward Weingarten, ECF Nos. 25-28.) Correction Officer Smith-Williams was personally served with a summons and complaint five days later, on June 3, 2015. (*See* Summons Returned Executed, ECF No. 33.)

On June 23, 2015, Mr. Edwards filed an Amended Complaint against the same defendants. (*See* Am. Compl., ECF No. 35.) The Amended Complaint corrected the original inversion of Correction Officer Smith-Williams's name. (*See id.*) The Amended Complaint asserts two claims against Correction Officer Smith-Williams and the John Doe defendants under 42 U.S.C. § 1983 based on their use of excessive force and retaliation against Mr. Edwards. (*See id.* ¶¶ 82-85, 90-94.) The Amended Complaint also asserts two claims against the City of New York under 42 U.S.C. § 1983 based on (1) its indifference to and widespread tolerance of a pattern and practice of the use of excessive force by DOC staff and (2) failure to properly screen, train, supervise, and/or discipline DOC staff to prevent violations of Mr. Edwards's constitutional rights. (*See id.* ¶¶ 86-89, 95-102.) Given that counsel for the City again refused to accept service on her behalf, Corrections Officer Smith-Williams was personally served with the Amended Complaint on June 25, 2015. (*See* Summons Returned Executed, ECF No. 41.)

ARGUMENT

I.
PLAINTIFF HAS ADEQUATELY PLEADED *MONELL* CLAIMS AGAINST THE CITY OF NEW YORK

In arguing that Plaintiff's claims against the City of New York should be dismissed, Defendants have confused the standard required to withstand a motion for summary judgment with the standard required to withstand a motion to dismiss. Unlike in the summary judgment context, where a court should consider and evaluate all the admissible evidence in the record, *see Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986), when ruling on a motion to dismiss, a court must "accept[] all factual claims in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." *Famous Horse Inc.* v. *5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010). Thus, a motion to dismiss should be denied where, as here, a complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)).

Claims brought under *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 694 (1978), in which the Supreme Court held that municipalities can be held liable under 42 U.S.C. § 1983 for constitutional violations committed by their employees, are treated no differently. *Monell* claims are not subject to a heightened pleading standard. Instead, such claims "need only comply with the notice pleading requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure, i.e. that it include 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Poux* v. *Cnty. of Suffolk,* No. 09-CV-3081 (SJF) (WDW), 2010 WL 1849279, at *11 (E.D.N.Y. May 4, 2010).

To state a *Monell* claim, a plaintiff is required to plead "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right."

Zahra v. *Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995) (citations omitted) (internal quotation marks omitted). Defendants' motion to dismiss focuses on the first of these elements, which can be satisfied by alleging either (1) "a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials" or (2) "a failure by policymakers to properly train or supervise their subordinates, amounting to deliberate indifference to the rights of those who come in contact with the municipal employees." *Saenz* v. *Lucas*, No. 07 Civ. 10534 (WCC), 2008 WL 2735867, at *5 (S.D.N.Y. July 9, 2008) (internal quotation marks omitted). *See also Amnesty Am.* v. *Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004). Here, Plaintiff has adequately pleaded *Monell* claims under each of these two theories.

A. Plaintiff Has Adequately Alleged the Existence of a Municipal Custom of Using Excessive Force Against Detainees

Plaintiff has clearly adequately alleged a pattern and practice of use of excessive force against detainees that is "so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials," *Saenz*, 2008 WL 2735867, at *5. As Defendants acknowledge (Defs.' Br. 7-11), to plead that the use of excessive force has been a "persistent and widespread" problem in DOC facilities for many years, Plaintiff has cited a report by the United States Attorney for the Southern District of New York, numerous news articles reporting on the use of excessive force by DOC officers, and numerous lawsuits in which plaintiffs alleged the use of excessive force by DOC officers. (*See, e.g.*, Am. Compl. ¶ 75 (quoting a report by the United States Attorney for the Southern District of New York which found that officers use excessive force and injure prisoners at a "staggering" rate and "officers with histories of involvement in staggering number of use of force incidents" remain employed for years and suffer few, if any, consequences), ¶ 76 (citing to a *New York*

Times report showing that use of force by officers had increased 90% over the five years beginning in 2009, more than two years before the beating); ¶ 78 (citing eighteen lawsuits filed between 1999 and 2011 alleging that DOC officers used excessive force against inmates, including five lawsuits involving the beatings of detainees in courthouse holding pens).) Mr. Edwards has even cited statements by the DOC's Commissioner Joseph Ponte, the very person ultimately in charge of the officers who beat Mr. Edwards, in which Commissioner Ponte admitted that the DOC's "past performance has been unacceptable."[2] (*Id.* ¶ 73 (citing a *New York Daily News* article dated June 2, 2014 that also reported "use of force by Correction staff has increased 59%" since 2010)).

Not surprisingly, courts in the Second Circuit routinely deny motions to dismiss where plaintiffs have supported their allegations with facts analogous to those Mr. Edwards has pleaded here. For example, in *McCants* v. *City of Newburgh*, the defendants argued that the plaintiffs' citations to seventeen similar lawsuits "simply demonstrate other individuals plausibly alleged that they experienced similar violations not that these violations actually occurred." No. 14-CV-556 (VB), 2014 WL 6645987, at *4 (S.D.N.Y. Nov. 21, 2014) (internal quotation marks omitted). The court, however, was unpersuaded, stating, "it matters not that the instances only prove a claimant asserted a violation, because they evidence the City was on notice to the possible use of excessive force by its police officers on seventeen different occasions." *Id.* Likewise, in *Bertuglia* v. *City of New York*, Judge Koeltl denied the defendants' motion to dismiss a failure to train claim, noting that the case was "at the pleadings stage," and the plaintiffs' amended complaint cited over fifteen cases in which City prosecutors allegedly committed misconduct and alleged that the City possessed many more unreported decisions

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2 Even if the summary judgment standard applied here, the statement of Commissioner Ponte would likely be admissible evidence in support of Plaintiff's claims. *See* Fed. R. Evid. 804(b)(3).

substantiating the same pattern. 839 F. Supp. 2d 703, 738 (S.D.N.Y. 2012). *See also Bektic–Marrero* v. *Goldberg*, 850 F. Supp. 2d 418, 431 (S.D.N.Y. 2012) (denying motion to dismiss where plaintiff supported her allegations against the county with a Department of Justice report outlining systematic failures in the jail's provision of medical care to inmates); *Graham* v. *Cnty. of Erie*, No. 11-CV-605S, 2012 WL 1980609, at *5-6 (W.D.N.Y. May 31, 2012) (denying motion to dismiss where plaintiff demonstrated "a pattern of documented shortcomings," which included several instances of misconduct documented by a DOJ investigation); *Ferrari* v. *Cnty. of Suffolk*, 790 F. Supp. 2d 34, 46 (E.D.N.Y. 2011) (denying motion to dismiss where plaintiff cited two cases involving conduct similar to the conduct he alleged); *Cantey* v. *City of New York*, No. 10 Civ. 4043 (JPO), 2012 WL 6771342 (S.D.N.Y. Dec. 11, 2012) (denying motion to dismiss where plaintiff, an inmate, alleged only (1) the facts relating to his arrest, (2) "that he was told that the decision to re-incarcerate him for an additional two months was made by 'the Department of Corrections," and (3) "that his transfer was 'pursuant to the standard policies and practices' of Defendants," and noting that "there is no way for this Court to determine whether a policy is in place until Plaintiff is permitted to take discovery"); *Battle* v. *City of New York*, No. 11 CIV. 3599, 2012 WL 112242, (S.D.N.Y. Jan. 12, 2012) (denying motion to dismiss where plaintiffs alleged that NYPD officers understood that searching and seizing livery car passengers was "routine," authorized under an NYPD inspection program, and would occur "more often" in the future).

Defendants' argument that the sources cited refer to excessive use of force incidents that are "dissimilar to Plaintiff's alleged incident" (*see, e.g.*, Defs.' Br. 7) makes little sense. The DOC statements, U.S. Attorney report, news articles, and prior lawsuits described in the Amended Complaint overwhelmingly paint a picture of persistent and widespread use of excessive force by the DOC. (Am. Compl. ¶¶ 70-81.) That these sources also refer to increases in inmate-on-inmate violence, the possible effect of the mental health of inmates on increases in violence, and violence with adolescent inmate populations in no way diminishes Plaintiff's allegations that they also demonstrate a custom of the use of excessive force by DOC officers against adult detainees and inmates like Plaintiff. As this Court noted earlier today in denying Defendants' request to bifurcate and stay discovery of the *Monell* claims, "[w]hile the news articles cited would never provide an evidentiary basis to prove a Monell claim, they may reasonably lead the plaintiff here to a view that one exists in fact. Discovery will either support such a claim or disprove its existence. This case is not so unusual in its allegations as to make pursuit of such discovery inappropriate here." (Mem. Endorsement, July 21, 2015, ECF No. 54.)

And while Defendants argue that "citing to other lawsuits is insufficient to sustain a claim of municipal liability" (Defs.' Br. 5; *see also id.* at 11-12), each of the cases they cite is distinguishable. In *Simms* v. *City of New York*, the Second Circuit affirmed the dismissal of the plaintiff's municipal liability claim against the City because the plaintiff's three factual allegations, one of which was a citation to one other similar lawsuit, were insufficient. 480 F. App'x 627, 629-30 (2d Cir. 2012). As noted above, Plaintiff here relies on much more than a single similar prior lawsuit or a mere three factual allegations to plead his claim. In *Collins* v. *City of New York*, the court noted that the cases cited "post-date[d the plaintiff's] conviction, or involve[d] something less (settlements without admissions of liability and unproven allegations) than evidence of misconduct," but ultimately *denied* the motion to dismiss the plaintiff's *Monell* claims on the ground that his additional allegations were sufficient. 923 F. Supp. 2d 462, 479 (E.D.N.Y. 2013). Plaintiff has cited reports and made additional allegations similar to those held sufficient to withstand the motion to dismiss in *Collins*. *Spears* v. *City of New York*, No. 10-CV-

03461, 2012 WL 4793541, at *11 (E.D.N.Y. Oct. 9. 2012); *Rasmussen* v. *City of New York*, 766 F. Supp. 2d 399, 409-10 (E.D.N.Y. 2011), and *Morris* v. *City of New York*, No. 12-CV-3959, 2013 WL 5781672, at *10-11 (E.D.N.Y. Oct. 28. 2013), each addresses the sufficiency of allegations of prior similar lawsuits to sustain claims for *Monell* liability at the summary judgment stage. But a different standard clearly applies here, where Defendants have moved to dismiss under Rule 12(b)(6). *See Ashcroft*, 556 U.S. at 678; *Poux,* 2010 WL 1849279, at *11.[3]

As for Defendants' argument that Plaintiff's allegations do not establish that the City was on notice of excessive use of force at the time of Mr. Edwards's beating in December 2011, Defendants cannot credibly claim that the City and DOC were not on notice of the "persistent and widespread" use of excessive force by DOC officers by the time Mr. Edwards was beaten in December 2011. Among other things, the Amended Complaint itself cites eighteen lawsuits filed between 1999 and 2011 that alleged similar incidents of excessive use of force by DOC officers (Am. Compl. ¶ 78) and the September 2011 Mayor's Management Report (*id.* ¶ 76 n.10) shows that the City had been tracking consistent increases in the "incidence and allegations of Department use of force" since at least 2007 and identifies "[e]nsur[ing] that uses of force are authorized and appropriate" as a critical objective of the DOC. Even the cited articles and reports which post-date Mr. Edwards's beating (*id.* ¶¶ 72, 74-76) reflect that the use of excessive force by DOC officers had been a persistent and widespread problem for years.

B. Plaintiff Has Adequately Alleged a Failure of Policymakers to Train or Supervise Subordinates

The Amended Complaint also adequately alleges a *Monell* claim based on "a failure by policymakers to properly train or supervise their subordinates, amounting to deliberate indifference to the rights of those who come in contact with the municipal employees," *Saenz*, 2008 WL 2735867, at *5 (internal quotation marks omitted). To establish such deliberate indifference, a plaintiff must show "(i) that a policymaker knows to a 'moral certainty' that the municipality's employees will confront a certain situation; (ii) either that the situation presents the municipal employee with a difficult choice of the type that training or supervision will make less difficult, or that there is a history of municipal employees improperly handling the situation; and (iii) that the wrong choice by the municipal employee will often cause the deprivation of an individual's constitutional rights." *Ambrose* v. *City of New York*, 623 F. Supp. 2d 454, 465 (S.D.N.Y. 2009) (quoting *Walker* v. *City of New York*, 974 F.2d 293, 297-98 (2d. Cir. 1992)). In these situations, "the need to act is so obvious, and the inadequacy of the current practice so likely to result in a deprivation of federal rights, that the municipality or official can be found deliberately indifferent to the need." *Reynolds* v. *Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007). *See also Vann* v. *City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995) ("An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents."). Furthermore, "because a single action on a policymaker's part is sufficient to create a municipal policy, a single instance of deliberate indifference to subordinates' actions can provide a basis for municipal liability." *Amnesty Am.*, 361 F.3d at 127.

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[3] In *Rodriguez* v. *Patricio*, No. 11 Civ. 0515 (ALC) (GWG) (S.D.N.Y. Mar. 15, 2013) (unpublished), the cases relied upon by plaintiff were cited in her moving papers, but not in the pleading itself, and the court relied on the standard required to overcome a motion for summary judgment, rather than a motion to dismiss.

There can be no question that DOC employees routinely confront situations where, as alleged here, a detainee does something to provoke a DOC employee, such as making repeated requests for medical assistance, even to the point of annoyance, and the DOC employee's wrong choice to use excessive force in response to such requests will cause the deprivation of an individual's constitutional rights. *Cf. City of Canton* v. *Harris*, 489 U.S. 378,390 n. 10 (1989) ("[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. . . . Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." (internal citations omitted).) The Amended Complaint describes in detail the City's history of mishandling such situations and the fact that such situations have continued to occur for years suggests that the City has not made a meaningful attempt to train or supervise DOC officers to forestall further incidents. As noted above, the Amended Complaint cites eighteen lawsuits filed in a span of twelve years prior to Mr. Edwards's beating alleging that DOC officers used excessive force against inmates, including five lawsuits involving the beatings of detainees in courthouse holding pens. (Am. Compl. ¶ 78.) Mr. Edwards has also cited news reports and a report by the United States Attorney for the Southern District of New York which detail the staggering, and increasing, number of use of force incidents in the several years preceding Mr. Edwards's beating. (Am. Compl. ¶¶ 73, 75-76.)

Moreover, even if no articles, lawsuits, or governmental reports were cited in the Amended Complaint, the actual circumstances of Mr. Edwards's beating and his treatment thereafter demonstrate "deliberate indifference" per se. *See Turpin* v. *Mailet*, 619 F.2d 196, 202 (2d Cir. 1980) ("A single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference or 'gross negligence' on the part of officials in charge.") Multiple officers participated in, witnessed, or later learned of Mr. Edwards's beating and did nothing to prevent or redress it. (*See* Am. Compl.

¶¶ 40, 42, 44, 52-53, 62-63.) Officer Smith-Williams instigated the beating and then, along with a DOC captain or sergeant, looked on and did nothing to stop it. (*Id.* ¶¶ 30-42.) Defendant John Doe 1 used excessive force to handcuff Mr. Edwards and then dragged him out of sight of other detainees to be beaten, presumably to minimize the number of witnesses. (*Id.* ¶¶ 39-40.) Defendants John Does 2-4 and other officers participated in the beating. (*Id.* ¶¶ 40-44.) Mr. Edwards told numerous DOC employees about the beating (*id.* ¶¶ 62, 81), and even received a threat from a DOC captain, who walked up to him out of the blue and said, "It never happened," (*id.* ¶ 63). Despite all this, upon information and belief, the DOC did not investigate or discipline any of the officers involved in any way. (*Id.* ¶ 62.) Such allegations, standing alone, are sufficient to establish "deliberate indifference." *See Hodge* v. *Ruperto*, 739 F. Supp. 873, 878 (S.D.N.Y. 1990) (denying motion for judgment on the pleadings where plaintiff's claim that "a number of officers" participated in the violations against him gave rise to an "inference of inadequate supervision amounting to deliberate indifference," reasoning that "claim[s] of inadequate training [are] strengthened by evidence that other officers were present when the violation occurred"); *Villante* v. *Dep't of Corr. of City of New York*, 786 F.2d 516, 522 (2d Cir. 1986) (reversing grant of summary judgment in part because "evidence that on several occasions no less than five named corrections officers watched and did nothing while the assailant was forcibly dragging [the plaintiff] away to his lair certainly would tend to prove that there had been a gross failure in those officers' training"); *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979) (reversing judgment on the pleadings where "[t]he brutal and premeditated nature of the beating in this case and the number and rank of officers involved warrant the allowance of limited discovery" and amendment of the complaint "so that the plaintiff may attempt to substantiate a claim of 'deliberate indifference' by the county to the violence of prison officials, stemming from a failure to train the guards in an adequate manner").

II.
PLAINTIFF'S CLAIMS AGAINST C.O. SMITH-WILLIAMS ARE NOT TIME-BARRED

Mr. Edwards's claims against C.O. Smith-Williams are timely. As Defendants acknowledge, Mr. Edwards's original complaint was filed *pro se* on December 17, 2014, just within the 3-year statute of limitations for claims under 42 U.S.C. § 1983. (Defs.' Br. 15.) *See, e.g.*, *Owens* v. *Okure*, 488 U.S. 235, 251 (1989). The original complaint named "CO Williams-Smith" as a defendant (Compl., ECF No. 2), inverting the order of Defendant Smith-Williams's hyphenated surname. After engaging counsel, Plaintiff filed an Amended Complaint on June 23, 2015 against the same defendants, which corrected the order of Defendant Smith-Williams's surname. (*See* Am. Compl., ECF No. 35.)

Pursuant to Fed. R. Civ. P. 15(c)(1)(C), an amendment that changes the naming of the party against whom a claim is asserted relates back to the date of the original pleading if (1) the amendment asserts a claim that arose out of the conduct, transaction, or occurrence set out in the original pleading and (2) within the 120 days provided for serving the summons and complaint, the party "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." *See also Bishop* v. *Best Buy Co., Inc.*, No. 08 Civ. 8427 (LBS), 2010 WL 4159566, at *2 (S.D.N.Y. Oct. 13, 2010).

Defendants do not dispute that the claims in the Amended Complaint arise out of the conduct set out in Mr. Edwards's original complaint. Instead, Defendants suggest—but, significantly, stop short of actually explicitly asserting (Defs. Br. 15-16)—that Defendant Smith-Williams did not receive notice of this action by April 16, 2015, which was 120 days from the filing of the original complaint. Defendants also argue that Mr. Edwards's inversion of her surname in the original complaint was not a "mistake" within the meaning of Rule 15(c). Both arguments fail as a matter of law.

A. Defendant Smith-Williams Had Notice of Plaintiff's Claims Within 120 Days of Their Filing

Mr. Edward's original *pro se* complaint identified "CO Williams-Smith" as "a corrections officer employed at . . . the Bronx Criminal Court" who was present when Mr. Edwards was beaten on or about December 18, 2011. (Compl. ¶¶ 5, 10, 14-15.) Despite the fact that Defendants now claim that "[t]he original Complaint contains no description whatsoever of [CO Williams-Smith]" (Defs.' Br. 15), this information was more than sufficient for counsel for the City to be able to identify "CO Williams-Smith" as Defendant Smith-Williams by March 13, 2015, at the latest. (*Id.*) Specifically, its letter to the Court dated March 13, 2015, counsel for the City noted that Defendant Smith-Williams's "names were inverted in the caption" of the original complaint, and represented that it intended to "interview[] Correction Officer Smith Williams now that she has been identified."[4] (Letter Mot., Mar. 13, 2015, ECF No. 9.) It cannot be the case that counsel for the City confirmed to the Court on March 13, 2015 that Defendant Smith-Williams was a proper defendant in this action without first informing Defendant Smith-Williams of the existence of the action. Indeed, counsel for the City has not disputed that Defendant Smith-Williams knew of the action by March 13, 2015. Because March 13, 2015 was fewer than 120 days after the filing of the original complaint, Defendant Smith-Williams therefore had the requisite notice under Rule 15(c).

But even if Defendant Smith-Williams did not have actual notice of Plaintiff's claims, knowledge may still be imputed to her because she and the City have the same counsel,

[4] In addition, counsel for the City represented to the Court on May 11, 2015 that, as of May 11, it had already interviewed Defendant Smith-Williams. (Letter re: Status Report 2, ECF No. 20.)

and her counsel clearly knew within the relevant time period that Defendant Smith-Williams was the proper defendant. "Notice of the lawsuit may be imputed to a potential defendant if a sufficiently related party is already a defendant in the case." *Curcio* v. *Davies*, No. 88 Civ. 4360 (SWK), 1991 WL 115765, at *2 (S.D.N.Y. June 14, 1991) (citing *Schiavone* v. *Fortune*, 477 U.S. 21, 29 (1986)). Notice can be imputed where, as here, "the original complaint names other government officers as defendants, the official to be added as a defendant is represented by the same government counsel as the original defendants, and counsel learns in a timely fashion that the additional official is likely to be added as a defendant." *Id.* *See also, e.g.*, *Hood* v. *City of New York*, 739 F. Supp. 196, 199 (S.D.N.Y. 1990); *Hodge* v. *Ruperto*, 739 F. Supp. 873, 881 (S.D.N.Y. 1990); *DuPree* v. *Walters*, 116 F.R.D. 31, 34 (S.D.N.Y. 1987).

The fact that Defendant Smith-Williams was not served within 120 days of the filing of the original complaint is irrelevant. Rule 15(c) only requires notice, not service. Even if service were required, Fed. R. Civ. P. 4(m), as Defendants acknowledge (Defs.' Br. 16 n.5), provides that "if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." *See also Charles* v. *N.Y.C. Police Dep't*, No. 96CIV.9757 (WHP) (THK), 1999 WL 717300, at *7 (S.D.N.Y. Sept. 15, 1999).

Here, Mr. Edwards had good cause for his failure to serve Defendant Smith-Williams within 120 days of the filing of his original complaint. From the time he filed his original complaint until more than 120 days thereafter, Mr. Edwards was not only proceeding *pro se* but was incarcerated, and therefore obviously had limited ability to effect service himself. Presumably for this reason, on January 12, 2015, this Court requested that Defendant Smith-Williams waive service of summons. (See Order 3, Jan. 12, 2015, ECF No. 6.) The DOC and the City stalled proper service by refusing to accept service on Smith-Williams's behalf and by failing to confirm Defendant Smith-Williams's identity for two months. (*See* Waiver of Service of Summons Unexecuted, Feb. 9, 2014, ECF No. 7; Letter Mot 2, Mar. 13, 2015, ECF No. 9.) Even after counsel for the City correctly identified Officer Smith-Williams, Officer Smith-Williams still refused to waive service of summons. Given these facts, Mr. Edwards has good cause for failing to serve Officer Smith-Williams within 120 days of filing the original complaint. Indeed, once Mr. Edwards retained pro bono counsel, Officer Smith-Williams was served with the original complaint within five days. (*See* Notices of Appearance, ECF No.25-28; Summons Returned Executed, ECF No. 33.)

B. Smith-Williams Knew or Should Have Known that, but for a Mistake Concerning Her Identity, the Action Would Have Been Brought Against Her

Defendant Smith-Williams also knew or should have known that she was an intended defendant in this case, "but for a mistake concerning [her] identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). A "mistake" for purposes of Rule 15(c) includes "an error by the plaintiff in either identifying the wrong person as a defendant or misstating that person's name or not knowing that he must name an individual as a defendant in lieu of simply suing the government." *Sigmund* v. *Martinez*, No. 06 CIV. 1043 RWS MHD, 2006 WL 2016263, at *4 (S.D.N.Y. July 13, 2006) (permitting the plaintiff to amend his complaint to name a new defendant, because of a mistake in identifying the officer who arrested him). "[C]uring a misnomer" is precisely the type of mistake for which relation back is permitted. *Smalls* v. *Fraser*, No. 05 CIV. 6575 (WHP) (TH), 2006 WL 2336911, at *3 (S.D.N.Y. Aug. 11, 2006) (permitting the plaintiff to amend his complaint to name the proper "'B' post officer" after learning through discovery that someone other than the officer named in his original complaint had been on duty the night of his assault). And for understandable reasons, courts are particularly forgiving of mistakes by *pro se* plaintiffs in these circumstances. *See Muhammad* v. *Pico*, No. 02 CIV. 1052 AJP, 2003 WL 21792158, at

*21 (S.D.N.Y. Aug. 5, 2003) (permitting amendment of complaint to name a defendant described, but not named, in the original complaint, noting that the plaintiff "initially was unsuccessful because as a pro se he did not have the ability to conduct an adequate investigation").

When Mr. Edwards inverted Defendant Smith-Williams's hyphenated surname in the original complaint, Mr. Edwards, then a *pro se* plaintiff, made the type of simple mistake that the drafters of Rule 15(c) intended to address. Indeed, Plaintiff's mistake in naming her as "CO Williams-Smith" instead of "CO Smith-Williams" is the type of error which courts have excused under Rule 15(c), even when plaintiffs are not incarcerated, *see, e.g.*, *Bishop*, 2010 WL 4159566, at *2-3 (permitting amendment to change "Best Buy, Co., Inc." and "Best Buy Co. of Minnesota" to "Best Buy, L.P"), and are represented by counsel, *see, e.g.*, *DuPree*, 116 F.R.D. at 34 (S.D.N.Y. 1987) (permitting amendment to change "K. Lido" to "Abdul-Karim Salaam").[5]

[5] *Bove* v. *New York City*, cited by Defendants, in which the Second Circuit did not permit relation back where the plaintiff sought to change "Officer Deutsch" to "Officer Doscher," 213 F.3d 625 (2d Cir. 2000), is clearly distinguishable. There, the Second Circuit noted, the plaintiff had access to a wealth of information prior to the filing of his original complaint that correctly identified "Officer Doscher" as the proper defendant, and "minimal investigation" would have revealed the proper name. *Id.* at 625. Moreover, *Bove* was decided before *Krupski* v. *Costa Crociere S.p.A.*, 560 U.S. 538 (2010), in which the Supreme Court clarified that Rule 15(c) focuses on what the party to be added knew or should have known, and "[i]nformation in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity." *Id.* at 548.

CONCLUSION

For the reasons set forth above, Mr. Edwards respectfully requests that the Court deny Defendants' motion to dismiss his Amended Complaint.

Dated: New York, New York
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